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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 838

MONTANA POWER COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION, THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, AND THE SECRETARY OF THE INTERIOR,
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

This brief is filed by respondent, Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation, Montana (Tribes), in opposition to the petition of Montana Power Company (Company) for a writ of *certiorari* to review the interlocutory order of the United States Court of Appeals for the District of Columbia Circuit entered in this case on July 15, 1970.

QUESTION PRESENTED

Whether petitioner, which had no right to exploit a hydroelectric site on the Tribes' Reservation except pursuant to Congressional authority, can (1) avail itself of

one clause of a unified section of the federal law containing that authority by obtaining tribal consent to an amendment which saved its license from revocation and reset the rentals it must pay to the Tribes for the privilege of exploiting their site, and (2) later disavow the validity of a related clause of the same section of the law which establishes the procedures for a fair, periodic readjustment of the annual rentals paid by the licensee?

STATUTES INVOLVED

In addition to the statutes cited by petitioner, there is the Act of March 7, 1928, which reads in pertinent part:

> ". . . *Provided further*, That the Federal Power Commission is authorized in accordance with the Federal Water Power Act and upon terms satisfactory to the Secretary of the Interior, to issue a permit or permits or a license or licenses for the use, for the development of power, of power sites on the Flathead Reservation and of water rights reserved or appropriated for the irrigation projects: *Provided further*, That rentals from such licenses for use of Indian lands shall be paid the Indians of said reservation as a tribe, which money shall be deposited in the Treasury of the United States to the credit of said Indians, and shall draw interest at the rate of 4 per centum: . . ." (45 Stat. 200, 212-213)

COUNTERSTATEMENT OF THE CASE

Petitioner's statement omits any reference to the following crucial facts.

Immediately after the Federal Power Commission was established in 1920,[1] the Company filed an application for a preliminary permit to develop the tribal site in-

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[1] Act of June 10, 1920, 41 Stat. 1063.

volved here.[4] Since the site was on tribal lands and could not be developed without the consent of Congress, as trustee for the Tribes, legislation was duly enacted in 1928 authorizing the licensing of the site by the Federal Power Commission.[5] A competing application for a license was filed and a hearing was held in 1929 before the Commission, then composed of the Secretaries of War, Agriculture and Interior. The Tribes were represented by the Secretary of the Interior, who at that time did not recognize them as having the right to veto the encumbrance or disposition of their own property.[6] In fact, the Secretary recommended that any license issued include a provision designed to benefit the United States and certain non-Indian water users, at the expense of the Tribes, even though the Tribes were bitterly opposed and even though the Secretary admitted that neither the United States nor the non-Indian water users had any legal right to the benefits so conferred.[7]

A license was issued in 1930 to the Company, and it contained the provision to which the Tribes objected. The Company, by the terms of the license, was to commence construction immediately and to pay the Tribes scheduled rentals. The Company defaulted in its performance and obligations under the license, which caused a loss to the Tribes of the scheduled rentals and left their valuable power site idle. The defaulted license was referred by the Commission in April, 1935, to the Attorney General

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[4] First Annual Report of the Federal Power Commission, p. 177 (1921). The application was filed by a wholly-owned subsidiary of petitioner.

[5] 45 Stat. 209, 212-213, quoted at p. 2, *supra*.

[6] The Tribes had accepted a proposal of the competing applicant and the Secretary characterized their action as follows:

> "This agreement [between the Tribes and the competing applicant] has of course no standing in law, because the Secretary of the Interior alone has the legal right to bind the Government in trust for these Indians." Senate Doc. No. 183, 71st Cong., 2d Sess., p. 16.

[7] *Ibid.*, pp. 40-42.

for "appropriate legal action", which meant revocation proceedings.[6]

Prior to the default, however, Congress in 1930 reconstituted the Commission, making it an independent body,[7] and in 1934 enacted the Indian Reorganization Act, granting broad powers of self-government to tribes organized under it.[8] While the license was in default, Congress amended the law governing federal water power resources.[9] The Company, in default and after the Tribes had organized under the Indian Reorganization Act, approached the Commission with a proposed amendment designed specifically to save its license, which was then subject to revocation proceedings. The Commission could not at that date, as it had in the past, act on the proposed amendment or deal with the site without the con-

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[6] See Petitioner's Appendix 30(a), note 26. Then, as now, the Federal Power Act provides:

> ". . . In case the construction of the project works, or of any specified part thereof, have been begun but not completed within the time prescribed in the license, or as extended by the commission, then the Attorney General, upon the request of the commission, shall institute proceedings in equity in the district court of the United States for the district in which any part of the project is situated for the revocation of said license, the sale of the works constructed, and such other equitable relief as the case may demand, as provided for in section 26 hereof." (41 Stat. 1071; 16 U.S.C. § 808.)

[7] Act of June 23, 1930, 46 Stat. 797. When the license was issued, the Secretary of the Interior was a member of the Commission and also represented the Tribes as trustee, which placed him in a position of conflict-of-interests in respect to the Company and the Tribes. The reorganization of the Commission removed him from this conflict.

[8] Act of June 18, 1934, 48 Stat. 984. This Act grants to Indian tribes organized thereunder extensive powers of self-government, including the power "to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets. . . ." (48 Stat. at 987.) The respondent Tribes organized under the Act with a constitution and bylaws approved by the Secretary of the Interior on October 28, 1935.

[9] Act of August 26, 1935, 49 Stat. 803, 838, 16 U.S.C. §§ 791a-825.

sent of the Tribes, because the controlling Section 10(e) of the Federal Power Act had been amended in August, 1935, to provide:

> ". . . That when licenses are issued involving . . . tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such . . . tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 16 of the Act of June 18, 1934 (48 Stat. 984) [the Indian Reorganization Act], fix a reasonable annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: . . ." [9]

The Company availed itself of the amended Section 10(e) of the Federal Power Act by securing tribal consent to its proposed amendment to the license. By that amendment the Tribes waived all accrued claims against the Company and consented to a new schedule of rentals or annual charges. The Commission then approved the amendment on July 17, 1936. This saved the Company's license.[10]

Pursuant to the authority of amended Section 10(e), the Tribes, on May 19, 1959, the twentieth anniversary of the commencement of commercial operations of the project, filed with the Commission a petition seeking a readjustment of the annual charges paid by the Company

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[9] Section 10(e), 49 Stat. at 843, 16 U.S.C. § 803.

[10] In filing its formal acceptance of the amendment with the Commission, the subsidiary-licensee of the Company took the following action: "In testimony of acceptance of all the terms and conditions of the foregoing instrument [Amendment No. 2] and the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), as amended, the Licensee . . . has caused these presents to be signed in its corporate name. . . ."

pursuant to the amendment to the license. The Company, in response to that petition, disavowed the validity of the very Act of Congress it used to save its license and asserted that the Commission did not have jurisdiction to readjust the annual charges on the ground that amended Section 10(e) was not applicable to the amended license. The Company contended a provision of Article 30(d) of the license, which provided for negotiation and arbitration, controlled.[9] The Commission rejected the Company's position in a preliminary determination. Following extensive hearings before a hearing examiner of the Commission, the Company's position on jurisdiction was rejected. The hearing examiner characterized its evidence on the merits as "unrealistic"[10] and recommended that the annual charges be increased from $238,375, the amount the Tribes were then receiving, to $850,000, beginning on the 20th anniversary of the commencement of commercial operation, with 6% simple interest on the unpaid balances.

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[9] Article 30(d) of the license provides:

> "The annual charges payable under this license may be readjusted at the end of twenty (20) years after the beginning of operation under this license and at periods of not less than ten (10) years thereafter by mutual agreement between the Commission and the Licensee, with the approval of the Secretary of the Interior. In case the Licensee, the Commission, and the Secretary of the Interior cannot agree upon the readjustment of such charges, it is hereby agreed that the fixing of readjusted charges shall be submitted to arbitration in the manner provided for in 'The United States Arbitrating Act,' (U.S.C. Title 9), such readjusted annual charges to be reasonable charges fixed upon the basis provided in Section 5 of Regulation 14 of the Commission, to-wit: upon the commercial value of the tribal lands involved, for the most profitable purpose for which suitable, including power development."

[10] "In summation, it is evident that the proposals of the Company's witnesses bear little relationship to any realistic determination of the commercial value of the Kerr site. . . ." 28 FPC at 800. The Company did not reprint the hearing examiner's decision as an appendix. It is reported at 28 FPC 768, 799 (August 4, 1966).

All parties appealed to the Commission. The Commission also rejected the Company's argument on jurisdiction and on the merits increased the hearing examiner's recommended readjusted annual charge to $950,000. The Commission's order was filed on October 4, 1967. Motions for reconsideration were denied on March 22, 1968. In the interim, however, on February 13, 1968, the Company filed a petition for a rate increase with the Montana Public Service Commission (Docket No. 5698) and asserted it was entitled to the increase, *inter alia*, because "greater payments to the Indians under Kerr rentals have greatly increased the cost of doing business and supplying electric service." The Tribes, of course, had not then and have not yet received a single red cent of the greater payments found due by the Commission, although the Company is collecting from its customers through increased rates the ordered higher rentals.[14]

Both parties sought review of the Federal Power Commission's order, the Company on all issues, the Tribes on a minor one. A panel of the Court of Appeals for the District of Columbia Circuit held on June 23, 1969, that the Commission erred in determining it had jurisdiction to readjust the annual charges.

The effect of the panel's ruling was to put the Tribes in the same position they had occupied prior to the 1935 amendment of Section 10(e) and before the Company's default, for the Company's argument, adopted by the panel, placed the readjustment of annual charges in negotiation between the Commission and the Company, with approval by the Secretary of the Interior, and if they could not agree, by arbitration. This left the Tribes, the real party in interest, without any standing to par-

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[14] The Company has been enjoying since January 13, 1969, a rate increase authorized by the Montana Public Service Commission. Order No. 3295, entered January 13, 1969, by the Public Service Commission of the State of Montana, Docket No. 5698, 77 PUR 3d 139 (1969).

ticipate in any of the proceedings involving the disposal of and payment for the use of their property. They were denied not only the right to promote their own interests, but they were faced with the unrealistic prospect of the Federal Power Commission negotiating with the Company over the use of the tribal resource or presenting evidence to the arbitrator in the face of the grim reality that neither the Commission nor its staff considers that the readjusted annual charge should be as great as do the Tribes.[11]

Petitions and suggestions for rehearings *en banc* were filed and granted and the full Court, on July 15, 1970, reversed its panel. It held that the Commission had jurisdiction and directed argument of the case on the merits before a panel of the Court. The Company, however, enjoying its rate increase and a favorable interest rate on the past-due payments,[12] filed its petition for writ of *certiorari*, even though the case has not been reviewed on the merits.

REASONS FOR DENYING THE WRIT

1. There is no federal question of *any* importance involved and petitioner is unable to offer any support to its bland assertion to the contrary. There is only one Federal Power Commission license—the subject one with an Indian tribe—where the licensee, being in default, relied on new statutory authority to preserve its license and thereafter, when the day of reckoning came, denied

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[11] The staff urged a readjusted annual charge of $611,000, and the Tribes $1,150,000 to $1,300,000. The Company recommended annual charges of $270,000 and the Secretary of the Interior $1,667,000. The negotiations between the Commission and the Company, as in the case of the arbitration, would be in camera, excluding the Tribes.

[12] The Tribes in effect are forced to lend money to the Company at 6% simple interest, for over the period of dispute the Company has had to borrow in the commercial market at the higher prime rates plus one-fourth of one per cent.

that a related clause of the same section applied to the controversy. Petitioner conjures the spectre of legions of litigants marching to court because "the decision below significantly impairs the rights of all persons whose interests are protected by the savings clauses now incorporated in scores of federal statutes." (Pet. 1.) The Tribes suggest that petitioner is lost in the vapor of its own reasoning.

2. The decision below is correct as a matter of law,[11] is in harmony with the decision of another Circuit,[12] and it is correct on the facts. The hearing examiner denied the petitioner's jurisdictional arguments and found against it on the facts. The Federal Power Commission denied petitioner's jurisdictional arguments and found against it on the facts, and the Court of Appeals on review denied petitioner's jurisdictional arguments and found against it on the facts on which they were based.

Now petitioner pleads for a new trial so it can allegedly produce more facts (Pet. 15). But petitioner has had its trial.

3. The decision below is not final and under Rule 20 of the Rules of this Court the petition should be denied.

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[11] In asserting the opinion below is at odds with decisions of this Court, petitioner cites *De La Rama S. S. Co. v. United States*, 344 U.S. 386. *De La Rama*, however, sailed off in the opposite direction. It involved a change in forum which would by reason of law "diminish substantially the recoverable amount". In the old forum, interest on any judgment accrued from the date the libel was filed, while in the new forum interest ran only from the date of final judgment (344 U.S. at 389-390).

[12] The decision below is in accord with that of *Pennsylvania Power and Light Co. v. FPC*, 139 F.2d 445 (3rd Cir. 1943), cert. den., 321 U.S. 793, in which the power company asserted arguments similar to those asserted by petitioner. Petitioner's argument is even weaker, however, for Pennsylvania Power had not defaulted under its license and therefore had not embraced in order to save its license the statutory provision incorporating the procedural change to which it objected.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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